Supreme Court, U.S.
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No. 97-306

In The

Supreme Court of the United States

October Term, 1996

SHIRLEY GEE; RYAN JEFFREY GEE; SEAN PAUL FONG, a minor by and through his guardian ad litem, Shirley Gee; PATRICIA SETO; SAMANTHA SETO; and COREY SETO,

Petitioners,

vs.

SOUTHWEST AIRLINES CO.,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Appropriately taking into account the unique facts involved in this particular case, the question presented by the petition is:

> Does section 105 of the Federal Aviation Act, 49 U.S.C. § 41713(b)(1), preempt emotional injury claims that arise from an airline's allegedly negligent rendition of services that do not involve any issue of aircraft safety, operations, or maintenance?

CORPORATE DISCLOSURE STATEMENT

Respondent Southwest Airlines Co. ("Southwest") has no parent company or nonwholly owned subsidiary.

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SUMMARY OF ARGUMENT

This case presents an issue whose time has clearly not yet come. Depending upon how the law continues to develop, both in the lower courts and the United States Congress, it may never come. In the meantime, and even without regard to the underlying merits, there are five principal reasons why there is no need for this Court to revisit the scope of preemption under the Airline Deregulation Act of 1978 (the "ADA") by granting the petition herein.

First, there is no "split in the circuits" among the United States Courts of Appeals. To the contrary, the only two federal appellate courts that have substantially addressed the issue of ADA preemption – the Fifth and Ninth Circuits – have adopted essentially the same approach. As Judge O'Scannlain noted in his specially concurring opinion below, the rule adopted by the Ninth Circuit is "consistent with the result reached by the only federal appellate court to have yet addressed this issue. . . . " (Pet. App. 20.)[1]

Second, in addition to being consistent in theoretical approach, the Fifth Circuit would likely reach the same result as the Ninth Circuit on the specific facts presented in this case. Indeed, in its decision in *Hodges v. Delta Air Lines*, 44 F.3d 334 (5th Cir. 1995), which fashioned an approach to ADA preemption like the one the Ninth Circuit adopted below, the Fifth Circuit cited its earlier

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[1] In addition, although petitioners sought en banc review in the Ninth Circuit, no judge requested a vote on the suggestion for rehearing en banc. (Pet. App. 5.)

decision in a case involving tort claims by a loud, boisterous, and intoxicated airline passenger as claims that would be preempted as "undeniably related only to the services provided by the airline." This Court denied certiorari in that earlier case.

Third, even if the Court at some point decides to provide additional guidance regarding the scope of ADA preemption, the unique facts in the present case do not present a suitable opportunity to do so. Significantly, this case involves only emotional injury claims, not claims for personal injury or death; there are no "safety" issues involved; and the claims in question do not relate to airline "operations or maintenance." It therefore does not present a close question that would fairly test the scope of ADA preemption or present an appropriate vehicle for further review.

Fourth, the Court has already addressed the preemption issue twice within the past five years in its decisions in *Morales v. Transworld Airlines, Inc.*, 504 U.S. 374 (1992) and *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), respectively. Courts in various jurisdictions are now applying those decisions to specific facts in specific cases to achieve a "closer working out" of the underlying legal principles. That process can and should be allowed to continue before, if ever, this Court finds it necessary to address the preemption issue yet again.

Finally, in 1994, Congress slightly modified the language of the ADA's preemption provision, but made it clear that it "did not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*." H.R. Conf. Rep. No. 103-677, at 83

(1994). If at some point Congress takes a different view, it can and will enact appropriate legislation. At present, however, there is no need for this Court to intervene.

ARGUMENT

I.

THE RULE ADOPTED BY THE NINTH CIRCUIT BELOW IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS AND THE RESULT REACHED BY THE ONLY OTHER FEDERAL COURT TO HAVE ADDRESSED THE ISSUE

In its decision below, the Ninth Circuit adopted an approach to ADA preemption that is fully consistent with this Court's decisions in *Morales* and *Wolens*, as well as *New York State Conf. of Blue Cross and Blue Shield v. Travelers Ins. Co.*, 115 S.Ct. 1671 (1995). In this regard, the Ninth Circuit construed those cases as indicating that section 105 of the ADA should not be extended to preempt safety-related personal injury or death claims arising from the operation and maintenance of an aircraft, as opposed to emotional injury claims stemming only from the negligent rendition of service by an airline. It observed that a distinction between "services" and "operations and maintenance" was also mandated by a provision in the ADA (49 U.S.C. § 1371(q)(1)), which requires airlines to obtain insurance, or self insure, to pay for "bodily injuries to or the death of any person" resulting from the "operation or maintenance of aircraft. . . . " (Pet. App. 14-15.)

Moreover, the Ninth Circuit noted that adopting an approach to preemption based upon this distinction is "harmonious with the results reached in other circuit and district courts," principally the Fifth Circuit's en banc decisions in *Hodges v. Delta Air Lines*, 44 F.3d 334 (5th Cir. 1995) and *Smith v. America West Airlines, Inc.*, 44 F.3d 344 (5th Cir. 1995). (Pet. App. 15-16.) In those two cases, the Fifth Circuit likewise analyzed this Court's previous decisions as authority for distinguishing between tort claims that arise out of the "operation and maintenance of aircraft" (which are not preempted) and those arising out of other, nonsafety-related services provided by an airline (which are preempted). This, of course, is the same approach that the Ninth Circuit has now adopted; and no other circuit has taken a contrary position.

Accordingly, as Judge O'Scannlain noted in his specially concurring opinion below, the rule adopted by the Ninth Circuit in the present case is "consistent with the result reached by the only federal appellate court to have yet addressed the issue [the Fifth Circuit in *Hodges v. Delta Air Lines, supra*]." (Pet. App. 20.) Under these circumstances, and particularly in light of the additional reasons discussed below, there is no need or justification for this Court to grant the petition in the present case.

II.

IN ADDITION TO BEING CONSISTENT IN THEORETICAL APPROACH, THE FIFTH CIRCUIT WOULD ALSO LIKELY REACH THE SAME RESULT ON THE SPECIFIC FACTS AT ISSUE IN THIS CASE

Petitioners claim that Southwest was negligent in protecting petitioners against the actions of other passengers, who allegedly subjected petitioners to a steady

stream of "insults, threats, intimidation, profanity, harassment, and racial slurs that continued for the entire flight." (Pet. App. 3-4.) The Ninth Circuit held that all such claims were preempted, following its earlier decision in *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995) and applying the distinction between claims arising out of the "operation and maintenance" of aircraft versus the "negligent rendition of service" described above.

Likewise, in *Hodges, supra,* the Fifth Circuit cited its earlier decision in *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989), as an example of a case that involved claims that were preempted because they "undeniably related only to the services provided by the airline," not any "safety-related tort duty." *Hodges, supra,* 44 F.3d at 339. In *O'Carroll*, the defendant airline removed the plaintiff and his cousin from a flight because they were loud, boisterous, and intoxicated. The plaintiff prevailed at trial on tort claims that he was wrongfully evicted from the flight. On appeal, the Fifth Circuit reversed and held that all of the plaintiff's state law claims were preempted under the ADA.

In *Hodges*, the Fifth Circuit observed that enforcement of O'Carroll's state law claims would have resulted in significant de facto regulation of the airline's boarding practices and interfered with federal law granting the airline substantial discretion to refuse to carry passengers. 44 F.3d at 339. The same conclusion is appropriate, for the same reason on similar facts, in the present case. This Court denied certiorari in *O'Carroll* and should also deny the petition in the present case.

III.

THE UNIQUE FACTS OF THIS CASE ALSO DO NOT PRESENT A SUITABLE VEHICLE FOR CLARIFYING THE SCOPE OF ADA PREEMPTION

In addition, even if the Court were otherwise inclined to revisit the issue of preemption under the ADA, this case does not present an appropriate vehicle for doing so. By any standard and applying any distinction, the claims in the present case are preempted. This dispute thus does not present a close question that would fairly test the scope of ADA preemption or provide an appropriate vehicle for further review. Importantly, this case does not involve claims for bodily injury. Instead, only emotional distress claims are involved. Moreover, the claims do not even arguably involve claims arising out of the "operations and maintenance" of an aircraft; nor are there any colorable "safety-related" claims involved.

On the contrary, the facts in the present case are classic examples of the type of claims that, under any analysis, would be preempted. Such claims, which involve not only the scope of state civil rights statutes but also conduct specifically governed by federal statutes and regulations, also present a perfect example of why preemption under the ADA must be construed broadly. Otherwise, airlines like Southwest would be subject to the varying, and sometimes conflicting, statutes and common law among the 50 states; and there would be no uniform regulation of conduct that would otherwise be subject to federal regulations, i.e., regulations that deal with serving alcohol to persons on an airline who appear to be intoxicated, or boarding practices which preclude the boarding

of any person who appears to be intoxicated, or regulations requiring airlines to provide safe and adequate service to air travelers. In all of these areas, uniformity is an absolute essential and the very purpose of the ADA's preemption provision.

Accordingly, regardless of whether this Court might at some later point deem some other case on other facts to be worthy of review, it should deny the petition in the present case.

IV.

THIS COURT HAS ALREADY ADDRESSED THE PREEMPTION ISSUE TWICE WITHIN THE PAST FIVE YEARS AND SHOULD NOW ALLOW OTHER COURTS TO ACHIEVE A "CLOSER WORKING OUT" OF THE UNDERLYING LEGAL PRINCIPLES

There is another reason why the Court should deny the petition: it has already addressed the issue of ADA preemption twice within the past five years in its decisions in *Morales* and *Wolens* in 1992 and 1995, respectively. Courts in various jurisdictions throughout the United States are now implementing this Court's decisions in those cases to other disputes in other cases arising out of a wide variety of different fact situations. That is precisely how our federal system of adjudication is supposed to work, as this Court should thus have the benefit of this fuller development of legal principles in specific cases before again addressing the preemption issue.

As this Court noted in *Wolens*, legal principles seldom can be settled "on the basis of one or two cases, but

require a closer working out." *Wolens, supra*, 513 U.S. at 234-35, citing Pound, *Survey of the Conference Problems*, 14 U.Cin. L.Rev. 324, 339 (1940) (Conference on the Status of the Rule of Judicial Precedent). That process should be allowed to continue in the lower courts, thus obtaining the benefit of applying the ADA's preemption in a greater array of specific factual settings, before, if ever, this Court again finds it necessary to address the issue.

V.

FURTHER REVIEW IS ALSO NOT NECESSARY BECAUSE CONGRESS HAS MADE IT CLEAR THAT IT "DID NOT INTEND TO ALTER THE BROAD PREEMPTION INTERPRETATION" ADOPTED BY THIS COURT IN *MORALES*

In *Morales, supra*, this Court adopted a broad interpretation of preemption under the ADA, holding that the Act's broad preemptive purpose is apparent from the ordinary meaning of the statutory language, as well as from the Court's earlier decisions construing similar language under ERISA. In reaching this conclusion, the Court rejected arguments that a narrower interpretation should be adopted because of differences between the overall statutory scheme under the ADA, as compared with ERISA, or because of the so-called "savings clause" in the ADA. *See* 49 U.S.C. at § 506. The Court also rejected the argument that the ADA's preemption clause only prohibited the states from actually prescribing rates, routes, or services, or only preempted state laws specifically addressed to the airline industry.

The Court in *Morales* did caution that certain state actions were "too tenuous, remote, or peripheral" to have

a preemptive effect, using as examples state laws against gambling and prostitution as applied to airlines. *Morales*, 504 U.S. at 390. In that case, however, as in the present case, no "borderline question" of this extreme type was presented; and there is no question that this Court otherwise gave an expansive interpretation to preemption under the ADA.

Significantly, as Justice O'Connor noted in her opinion concurring and dissenting in part in *Wolens*, after this Court's decision in *Morales*, Congress revisited the preemption issue and said that it "'[d]id not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*,' HR Conf Rep No. 103-677, at 83 (1994)." *Wolens*, 513 U.S. at 246. Particularly under these circumstances indicating Congress' apparent approval of a very broad preemption interpretation, there is no need for this Court to revisit the issue as well.

Ultimately, the expansive interpretation of preemption this Court adopted in *Morales* and *Wolens* rests upon considerations of public policy. But efforts to make changes on policy issues should in most cases be addressed to Congress, not the federal courts. *See, e.g., Federal Communications Commission v. Beech Communications, Inc.*, 508 U.S. 307, 315-16 (1993) (Constitution does not grant courts license to judge the wisdom, fairness, or logic of legislative choices). *See also In re Pederson*, 875 F.2d 781 (9th Cir. 1989) (federal courts without authority to second guess policy judgments made by the political branches of the government); and *Kotarski v. Cooper*, 866 F.2d 311 (9th Cir. 1989) (federal courts should defer to judgment of Congress on policy issues).

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Dated: September 12, 1997

Respectfully submitted,

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